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No. 02-638

Supreme Court, U.S.
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In The

Supreme Court of the United States

AGENCIA LA ESPERANZA CORPORATION, INC.,

Petitioner,

v.

ORANGE COUNTY BOARD OF SUPERVISORS and ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) apply to a legislatively enacted development fee imposed on a general, ministerial and nondiscretionary basis?[1]

[1] Petitioner frames the question "May a local government avoid the 'rough proportionality' test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions (including 'impact' fees) by legislative enactment?"

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STATEMENT OF THE CASE

The County of Orange ("County"), under authority of California Government Code section 66484.3, requires developers of new residential and non-residential buildings to pay one-time development fees to mitigate the traffic impact of new developments. The fees are based on the number of units in residential projects and the square footage of non-residential projects. Petitioner Agencia La Esperanza Corporation, Inc. ("Esperanza") is one of several developers of self-storage facilities, classified as nonresidential properties, which challenged the fees as violations of the California Mitigation Fee Act (California Government Code section 66000, *et seq.*) and as unconstitutional takings of property as delineated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The California Supreme Court in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996) applied heightened scrutiny under these holdings to a fee applied on an individual and discretionary basis, but not to a legislatively enacted fee which was imposed on a general, ministerial and nondiscretionary basis. Esperanza asserts that the fees imposed by the County did not properly balance the amount of the fees with the impact on infrastructure and are subject to heightened scrutiny under *Dolan*. The California Court of Appeal rejected Esperanza's arguments finding that "the County's method of allocating fees is acceptable . . . and is not subject to heightened scrutiny under *Ehrlich*" and affirmed the trial court judgment in an unpublished opinion, *Agencia La Esperanza Corporation, Inc. v. Orange*

County Board of Suprevisors, G027288.[2] Opin. 4-5. Esperanza filed a petition for review in the California Supreme Court, which denied review on July 10, 2002. This Petition for Writ of Certiorari was timely filed on October 23, 2002.

SUMMARY OF ARGUMENT

The thrust of Esperanza's Petition for Writ of Certiorari is that the *Dolan* "rough proportionality" standard should apply to fees even when they are adopted by legislative action and imposed on a general and ministerial basis rather than on an individual and discretionary basis. Esperanza also argues that lower courts are split on whether the *Dolan* "rough proportionality" standard should apply to such fees.

The County of Orange maintains that review by this Court is not necessary because these legal principles are well settled and treated consistently. The decision of the California Court of Appeal is correct and consistent with the decisions of this Court including the decisions in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The Court of Appeals analyzed those cases, as applied in *Ehrlich*, and correctly held, like other jurisdictions around

[2] The decision (hereinafter Opin. is attached to the Petition for Writ of Certiorari as Appendix A. The Court of Appeal rejected similar arguments in other unpublished decisions including *Extra Space of Laguna Hills v. San Joaquin Hills Transportation Corridor Agency* and *Extra Space of Laguna Hills v. City of San Clemente*, neither of which is before this Court for review.

the country, that a monetary exaction imposed "uniformly, generally and ministerially," does not trigger the heightened scrutiny of *Nollan* and *Dolan*. Opin. at 3-4.

Petitioner erroneously asserts that there is a conflict among various courts on this issue. In all Takings Clause cases involving legislatively formulated development fees uniformly imposed on a broad class, *Dolan* has been held inapplicable. While the rationale in some cases has differed slightly, the result has been consistent. Thus, contrary to Petitioner's contention, no real conflict exists.

Review should also be denied because the opinion below was issued by the California Court of Appeal which is not the court of last resort in California. Therefore, to the extent that a conflict is asserted, it is not subject to the same level of concern as a conflict among courts of last resort. For these reasons, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL WAS CORRECT AND CONSISTENT WITH THIS COURT'S TAKINGS DECISIONS

The California Court of Appeal followed the line of cases decided by this Court and the California courts interpreting the Takings Clause of the U.S. Constitution as it applies to legislatively imposed monetary charges, the application of which is uniform, general and ministerial. It reviewed the holdings of this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), as applied by

the California Supreme Court to certain fee structures in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996). In both *Nollan* and *Dolan*, a local government agency required transfer of an interest in real property as a condition of approval for development of a single parcel. *Id.* at 874. In both of those cases, this Court imposed a heightened level of scrutiny on the exactions because they involved imposition of a requirement to dedicate real property on an individual and discretionary basis that was potentially unfair to a property owner seeking development approval. *Id.* at 866. These combined elements create the possibility of improper use of the legitimate regulatory authority of a local government to leverage a specific interest in real property. *Id.* at 869.

The Court of Appeal relied heavily on the decision in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 in which the California Supreme Court, after remand from this Court, engaged in an extensive review of *Nollan* and *Dolan* as applied to development fees (a recreation fee and a fee for "art in public places") imposed on a proposed development.[3] As observed by the Court of Appeal, the California Supreme Court concluded that California law does not distinguish between a physical taking and the imposition

[3] The *Ehrlich* court noted that scholarly comment on the two cases is almost unmanageably large. *Ehrlich* at p. 869, n.6. That trend has continued and it is now arguable that every conceivable position on the subject has been analyzed, including the benefit of uncertainty, Poirer, Marc. C., *Article: The Virtue of Vagueness in Takings Doctrine*, 24 Cardozo L. Rev. 93 (2002), and *Ehrlich* as a clear statement of the probable scope of the law of takings. Faus, Richard D., *Practice Commentary: Exactions, Impact Fees, and Exactions – Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675 (2000).

of fees but limits the application of heightened scrutiny under *Nollan* and *Dolan* to land use cases "exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation." Opin. at 3, citing *Ehrlich* at 868. The *Ehrlich* court observed that where monetary exactions are imposed "neither generally nor ministerially, but on an individual and discretionary basis ... the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered." *Id.* at 876. The *Ehrlich* court determined that the individually assessed recreation fee imposed as a condition of approval of a specific project was subject to heightened scrutiny while the legislatively adopted, broadly applied "art in public places" requirement was not. *Id.* at 885-886. Following the holding in *Ehrlich*, the Court of Appeal in this case found that Orange County's calculation of the development fee, while imprecise, was applied uniformly, generally and ministerially and thus, heightened scrutiny was not triggered. Opin. at 4. See also *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 19 Cal. 4th 952 (1999), cert. den., 526 U.S. 1131 (1999) (legislative adoption of a generally applicable rent control law did not result in a taking under *Nollan, Dolan* and *Ehrlich*) and *Home Builders Association of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001) (*Dolan* standard does not apply to inclusionary zoning ordinance applicable to all development in the city).

Further supporting the correctness of the California Court of Appeal's decision is *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) where this Court observed that it has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of

development on the dedication of property to public use." *Id.* at 702-703.[4] As such, the *Dolan* test would not apply to a development fee.

The California Supreme Court most recently reviewed this subject in *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002). In that decision, the court again reviewed in detail this Court's decisions in *Nollan, Dolan* and *Del Monte Dunes. Id.* at 665-673. It specifically declined the invitation to extend heightened judicial scrutiny to all development fees, adhering instead to the distinction drawn in *Ehrlich* between ad hoc adjudicatory exactions and formulaic, broadly applicable legislative mitigation fees. *Id.* at 670-671.

The Court of Appeal correctly applied the reasoning of *Ehrlich,* in this case. This reasoning is sound, consistent with the holdings of this Court and need not be reviewed again here.

II. THE CASES CITED BY PETITIONERS DO NOT CONFLICT WITH THE HOLDINGS IN *NOLLAN* AND *DOLAN*

Courts have consistently applied the analysis of the California Supreme Court in *Ehrlich* and *San Remo* when considering whether the heightened scrutiny requirements

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[4] It has been suggested in other contexts that the Takings Clause has focused on an interest in physical or intellectual property, not on an obligation to pay money. Faus, Richard D., *Practice Commentary: Exactions, Impact Fees, and Exactions – Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675 (2000), citing *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

of *Nollan* and *Dolan* should apply to development impact fees imposed by local governments. Petitioner claims that cases such as *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E. 2d 384 (Ill. 1995), *Manocherian v. Lenox Hill Hospital*, 643 N.E. 2d 479 (N.Y. 1994) and *Trimen Development Co. v. Kings County*, 877 P. 2d 187 (Wash. 1994), among others, conflict with this analysis. On closer inspection, the cases cited by Petitioner are significantly distinguishable both factually and legally. Courts have treated legislatively imposed development fees applied uniformly, generally and ministerially consistently following *Nollan* and *Dolan*.

A. Courts Have Treated Legislatively Adopted Fees Consistently

Petitioner cites cases from various state and federal jurisdictions in an effort to show a conflict among the courts in their application of heightened scrutiny under *Nollan* and *Dolan* to development fees and other conditions not requiring dedication of property. Careful review of those cases indicates instead, that various courts have consistently declined to apply heightened scrutiny to legislatively imposed development fees applied uniformly, generally and ministerially. Results differ, as will be seen, only when the condition imposed is individual and discretionary or relates to the use of real property, neither of which exists in this case. The following cases all considered legislatively imposed development fees applied uniformly, generally and ministerially and concluded that heightened scrutiny under *Nollan* and *Dolan* did not apply.

In *National Association of Home Builders v. Chesterfield County*, 907 F. Supp. 166 (1995) the District Court reviewed a statutory policy requiring cash payments, in exchange for approval of residential rezoning applications, to provide for the capital improvements required by the development. The *Chesterfield County* court concluded that it did not need to determine whether *Dolan* applied because it found the policy, applicable to all residential rezoning requests, to be capable on its face of application consistent with the *Dolan* standard. Since it did not apply *Dolan* to the payment in question, it cannot be considered a conflict. In fact, rather than create a conflict, like most courts, it noted that *Dolan* is relevant, if at all, as the test that a particular application of the policy might be required to meet. *Id.* at 168. This parallels the result reached by the California Supreme Court in *Ehrlich* (12 Cal. 4th at 872-875) that legislatively imposed development fees applied uniformly, generally and ministerially are not subject to the *Dolan* test and cannot be seen as a conflict in how to apply *Nollan* and *Dolan*.

In *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P. 2d 993, cert. den., 521 U.S. 1120 (1997), the Arizona Supreme Court found that a legislatively adopted water resources fee applicable to all new realty developments was not subject to *Dolan* "heightened scrutiny" and noted favorably the distinctions drawn by the California Supreme Court in *Ehrlich*. *Id.* at 486. Thus, the case supports the principle that legislatively imposed development fees applied uniformly, generally and ministerially are not subject to the *Dolan* test.

Also consistent with the reasoning of the Court of Appeal in this case is *Krupp v. Breckenridge Sanitation District*, 19 P. 3d 687 (Colo. 2001), where the court indicated

that "Application of the *Nollan/Dolan* test has been limited to the narrow set of cases where a permitting authority, through a specific, discretionary adjudicative determination conditions continued development on the exaction of private property for public use." *Id.* at 696. The *Krupp* Court found the fee to be a valid, legislatively established fee, which did not fall into the narrow category of charges subject to heightened scrutiny under *Nollan/Dolan. Id.* at 692, 695. The court also noted that the Colorado regulatory takings statute codified the *Nollan/Dolan* test, including the distinction between legislative and adjudicative determinations, and therefore that test did not apply to a legislatively formulated fee imposed on a broad class of property owners. *Id.* at 696.

The Oregon Court of Appeal in *Rogers Machinery, Inc. v. Washington County*, 45 P. 3d 966, *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (2002) agreed with the California Supreme Court's analysis in *Ehrlich* and *San Remo Hotel* and noted that "With near uniformity, lower courts applying *Dolan* to monetary exactions have done so *only* when the exaction has been imposed through an adjudicatory process; they have expressly declined to use *Dolan's* heightened scrutiny in testing development or impact fees imposed on broad classes of property pursuant to legislatively adopted fee schemes." *Id.* at 978 (emphasis in original), citing *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P. 2d 993, cert. den., 521 U.S. 1120 (1997); *Krupp v. Breckenridge Sanitation District,* 19 P. 3d 687; *Waters v. Montgomery County*, 650 A. 2d 712, 724 (1994); *Town of Flower Mound v. Stafford Estates Ltd. Partnership,* 71 S.W. 3d 18 (Tex. App. 2002) (petition for review granted Dec. 12, 2002).

Thus, there is no conflict among the courts in the application of heightened scrutiny under *Nollan/Dolan* to legislatively imposed development fees applied uniformly, generally and ministerially.

B. Courts Have Treated Legislative Land Use Regulations Consistently

As with legislatively imposed development fees, there has been no conflict in the treatment by the courts under *Dolan* of legislatively imposed land use regulations applied uniformly, generally and ministerially.

Parking Association of Georgia v. City of Atlanta, 450 S.E. 2d 200, cert. den., 515 U.S. 1116 (1995), addressed a legislative enactment applicable to many landowners which regulated the use of a portion of their lands unlike the adjudicative decision to condition in *Dolan*. *Id.* at 203. The Georgia Supreme Court concluded that *Dolan* did not apply and that the City had complied with the "rough proportionality" test of *Dolan* in any event. *Id.* at 202-203. Justices Thomas and O'Connor dissented from the denial of certiorari on the basis of confusion among lower courts. 515 U.S. 1116.

In *Southeast Cass Water Resource District v. Burlington Northern Railroad Company*, 527 N.W. 2d 884 (1995), the North Dakota Supreme Court examined a legislatively imposed requirement mandating that railroads provide culverts and other openings through their bridges and other improvements to permit drainage. The North Dakota Supreme Court applied relevant federal and state precedents to conclude that there is no taking where a police power regulation required railroads to absorb the cost of changing its bridges and culverts to accommodate

drainage changes. *Id.* at 893-894. *Nollan* and *Dolan* were found not to apply to a legislated police-power regulation as opposed to a municipal "adjucative decision to condition." *Id.* at 896.

C. Courts Have Treated Individual and Discretionary Land Use Conditions Consistently

Petitioner cites several cases purporting to indicate a conflict in application of *Dolan* to legislatively imposed development fees. The following cases from that group instead address land use restrictions applicable only to individual properties or imposed on an individual and discretionary basis.

For example, *Manocherian v. Lenox Hill Hospital*, 643 N.E. 2d 479 (N.Y. 1994), was decided only a few months after *Dolan* and only incidentally cites that case. The *Manocherian* court applied the *Nollan* analysis to a rent control statute that limited the owner's right to possess, use or dispose of their property.[5] While adopted as legislation, it applied only to a small group of properties rented by hospitals as housing for their staffs. *Id.* at 480-481. The regulation was not a fee, but a limitation on use of property. *Id.* at 480-481. As such, it is consistent with the majority of courts which have applied *Nollan, Dolan* scrutiny to individualized regulations affecting the use of property rather than to fees.

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[5] The decision of the Court of Appeals of New York in *Bonnie Briar Syndicate v. Town of Mamaroneck*, 721 N.E. 2d 971 (1999) may cast doubt on the *Manocherian* holding.

The decision of the First Circuit in *City of Portsmouth New Hampshire v. Schlesinger*, 57 F. 3d 12 (1995) parallels closely the California Supreme Court decision in *Ehrlich* in that it invalidated a fee imposed on an individual and discretionary basis after extensive negotiation. The decision of the City Council in *Schlesinger* was essentially fact specific and therefore administrative. As such, heightened scrutiny applied. *Id.* at 17.

D. No Conflict Occurs Where Courts Apply State Law Standards Instead of *Dolan*

Instead of presenting conflicts in application of the Takings Clause, the following cases appear to apply state law analysis.

Trimen Development Co. v. Kings County, 877 P. 2d 187 (Wash. 1994) was an application of a state law standard of review to a legislative fee requirement. The court concluded that the fees were lawful if they met a state statutory standard that required the fees to be imposed pursuant to a voluntary agreement and reasonably necessary as a result of the development or to mitigate its effects. *Id.* at 192. The case, decided only one month after *Dolan*, did not apply the *Nollan/Dolan* test or engage in any analysis of takings jurisprudence, but merely cited *Dolan* in dicta. *Id.* at 194. The court did not apply *Dolan* to a legislatively adopted development fee. Since the decision was based on application of state law requirements, it does not indicate a conflict in application of the *Dolan* standard.

The decision in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E. 2d 384 (Ill. 1995) cannot truly be considered a conflict in the way courts apply *Nollan* and *Dolan* either. In *Northern Illinois*

Home Builders, the Illinois Supreme Court simply followed its long-standing state law doctrine as set forth in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E. 2d 799 (Ill. 1961) which applied a strict "specifically and uniquely attributable" test. *Northern Illinois Home Builders*, 649 N.E. 2d at 389. This Court declined to adopt that test. *Dolan*, 512 U.S. at 389-90. Thus, since it does not apply heightened scrutiny under *Dolan* it does not demonstrate a conflict in application of the *Dolan* test.

In *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E. 2d 349 (2000), the Ohio Supreme Court considered the constitutionality of an ordinance that established an impact fee payable by developers to contribute to the cost of new roadways. In its analysis, the Ohio Supreme Court reviewed *Nollan* and *Dolan* and then imposed what it called a "dual rational nexus" test which requires a court to determine: (1) whether there is a reasonable connection between the need for additional capital facilities and the growth generated by the proposed development and (2) if so, whether there is a reasonable connection between the expenditure of the funds collected via the fee and the benefits accruing to the subdivision. *Id.* at 354-355. The court held that the fee met both prongs of the test. *Id.* at 356. It did not apply the *Dolan* "rough proportionality" test to the development fee. It also ignored the conclusion of this Court in *Del Monte Dunes* that *Nollan* and *Dolan* apply only to exactions of real property rather than fees (*Del Monte Dunes*, 526 U.S. at 702-703). *Home Builders Association* is the only case since the California Supreme Court decision in *Ehrlich* which did not consider or apply the *Ehrlich* analysis to an impact fee. The Ohio Supreme Court instead found a rational nexus between the benefit

of the improvement to the developer and the fee. *Home Builders Association*, 729 N.E. 2d at 128. This is not a conflict in application of *Nollan* and *Dolan*, but is, in effect, a new state law test for that state. *Id.* at 356. Indeed, the Oregon Supreme Court explained: "The court's analysis is difficult to square with *Dolan* and, in fact, mirrors the more deferential test traditionally used for user fees and other purely monetary assessments." *Rogers Machinery, Inc. v. Washington County*, 45 P. 3d 967, 978, petition for review to the Supreme Court of Oregon denied, 52 P.3d 1057 (2002).

While these cases apply different tests under state law to development fees, none arrives at a different result by application of *Dolan* and, consequently, these cases do not demonstrate a conflict among states in Taking Clause doctrine that requires review.

III. POSSIBLE CONFLICT AMONG STATE COURTS IS LESS IMPORTANT WHEN THE DECISION IS NOT BY THE HIGHEST STATE COURT

Under the rules of this Court, even the existence of possible conflict among state courts does not require review where the decision is not by the highest state court.

Supreme Court Rule 10(b) provides that a reason to grant a petition for writ of certiorari is that a state court of last resort has decided a federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals.

Although Rule 10 is not the exclusive reason for determining whether to grant a petition for writ of certiorari, it suggests that decisions by state courts that are not

the court of last resort are less important in assessing the existence of conflicts between courts than are decisions by state courts of last resort.

There are good reasons for this view. First, a decision by a state intermediate appellate court is less likely to be considered outside of its jurisdiction. Second, the decision of the intermediate appellate court can be corrected later by the state court of last resort.

Here, the California Court of Appeal rendered the decision. It is not the court of last resort. The California Supreme Court is, and it denied review of this case.

IV. CONCLUSION

Courts throughout the country have been consistent in consideration of heightened scrutiny under *Dolan* to legislatively imposed development fees applied uniformly, generally and ministerially. The conflict asserted by Esperanza is without merit as a basis for review by this Court. The County of Orange respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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